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Nos. 87-253 and 87-431

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

OTIS R. BOWEN, SECRETARY OF
HEALTH AND HUMAN SERVICES
Appellant,

vs.

CHAN KENDRICK, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, THE AMERICAN JEWISH COMMITTEE, AND AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS AMICI CURIAE IN SUPPORT OF APPELLEES

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QUESTION PRESENTED

Does the award of grants to religious organizations under the Adolescent Family Life Act, 42 U.S.C. §§300z et seq., violate the Establishment Clause?

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Pursuant to Rule 36.2 of the Rules of this Court, the organizations named above file this brief in support of Appellees. Consent for the filing of this brief has

been obtained in writing from the attorneys of record for the parties in this case. Their original letters of consent have been filed with the Clerk of this Court.

INTEREST OF THE AMICI CURIAE

The record in this case is dramatic evidence of the insurmountable constitutional problems created by a grant program that pays religious organizations to teach sexual morality. While we commend these and other religious organizations for aggressively combating sexual promiscuity and teen pregnancy, their efforts necessarily involve the promotion of religion. Because public funds should not be used to advance religion, the following organizations have filed this brief amici curiae:

The Baptist Joint Committee on Public Affairs is composed of representatives from eight national cooperating Baptist conventions and conferences in the United States. They are: American Baptist Churches in the U.S.A.; Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Seventh Day Baptist General Conference; and Southern Baptist Convention. These constituent bodies have a total membership of approximately 30 million and reflect the traditional Baptist concern for proper church-state relations.

The American Jewish Committee, a national organization of approximately 50,000 members, was founded in 1906 to protect the civil and religious rights of Jews. It is the conviction of this orga-

nization that the civil and religious rights of Jews will be secure only when the civil and religious rights of Americans of all faiths are equally secure. To fulfill this aspiration, AJC strongly supports the constitutional principle of separation of religion and government.

Americans United for Separation of Church and State is a non-profit corporation formed to maintain and advance civil and religious liberties through enforcement of the rights and privileges granted by the First and Fourteenth Amendments to the U.S. Constitution and comparable provisions of the state constitutions. Americans United is a national organization of some 40,000 members of various religious beliefs and some of no religious belief in all states of the United States.

Americans United is involved in extensive litigation of First Amendment Free Exercise and Establishment issues throughout the United States, has been involved in many of the major Free Exercise and Establishment Clause cases heard by the U.S. Supreme Court, and is particularly interested in the issues raised by this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Adolescent Family Life Act, 42 U.S.C. §§300z et seq. and the First Amendment to the U.S. Constitution, which provides in part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

SUMMARY OF ARGUMENT

It is impossible for religious organizations to teach sexual morality without consciously or unconsciously promoting religion. Therefore, any grant program that subsidizes such activity is constitutionally impermissible. Moreover, any attempt to prevent religious indoctrination in such a program would lead to excessive entanglement between government and religion.

The unique combination of education (i.e., teaching, counseling and referral services) with a fundamental moral issue (i.e., premarital sex and abortion) distinguishes this case from those upholding programs that subsidize the provision of purely secular services (e.g., housing and medical care) by religious organizations. This case is also distinguishable from those permitting government to pursue secular policies that happen to coincide with widely held religious beliefs. In stark contrast, the Adolescent Family Life Act [hereinafter "the Act" or "AFLA"] pays religious organizations to promote their religious doctrines because they happen to coincide with government policy. While we commend Congress for combating teen pregnancy, this daring attempt to use religious education to accomplish the secular goals of government must not be allowed.

ARGUMENT

I.

THE AWARD OF AFLA GRANTS TO RELIGIOUS ORGANIZATIONS HAS THE PRIMARY EFFECT OF ADVANCING RELIGION REGARDLESS OF WHETHER OR NOT THOSE ORGANIZATIONS ARE PERVASIVELY SECTARIAN.

You want to know the church teachings on sexuality? You are the church. You people sitting here are the body of Christ. The teachings of you and the

things you value are, in fact, the values of the Catholic Church.

. . . . . .

The Good news about people is that we are called to the fullness of life. We are called to this through relationship with Jesus Christ. We are called to live simultaneously on four levels: the physical, the cultural, the personal and the transcendent, which means "spiritual" or "graced."

The good news about sex is that it has meaning and values on all four of these levels. . . .

. . . . . .

By acquainting young people with the marvelous signs of fertility alive in their own bodies, the RAINBOW Program provides not only a more Christian, pro-life education in sexuality than that available in the public sector, but also fosters in teens a sense of wonder and respect for their bodies that connects sexuality to the transmission of life and places them both solidly within the context of committed marital relationships

-- Excerpts from lectures and materials used in conjunction with AFLA-funded programs. (J.A. 226, 369-370).

A fundamental tenet of religious liberty and its corollary, church-state separation, is that no person should be taxed to support the propagation of religion. Taxing for the support of

religion is "sinful and tyrannical," wrote Jefferson.[1]

Because religious organizations should be dependent upon their own financial resources and not upon those of the state, the Court has scrutinized carefully any legislative scheme that diverts public monies to religious institutions. The Court's approach, which is both straightforward and succinct, has been set forth clearly in a number of cases.

First, "no state aid at all [may] go to institutions that are so 'pervasively sectarian' that secular activities cannot be separated from sectarian ones. . . ." Roemer v. Board of Public Works, 426 U.S. 736, 755 (1976); Hunt v. McNair, 413 U.S. 734, 743 (1973). "Even though earmarked

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[1]Thomas Jefferson, A Bill for Establishing Religious Freedom, as quoted in William Lee Miller, The First Liberty: Religion and the American Republic (New York: Alfred A. Knopf, 1986), Appendix I.

for secular purposes, 'when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission,' state aid has the impermissible primary effect of advancing religion." Meek v. Pittenger, 421 U.S. 349, 365-66 (1975) (quoting Hunt, 413 U.S. at 743).

Second, "if secular activities can be separated out, they alone may be funded." Roemer, 426 U.S. at 755; Hunt, 413 U.S. at 743.

In short, only religious institutions that are not pervasively sectarian may receive direct federal financial assistance[2] and, then, only for activities that are wholly secular and segregated

[2]Amici recognize that certain types of indirect financial assistance to pervasively sectarian institutions may be constitutionally permissible. See, e.g., Witters v. Washington Department of Services for the Blind, ___ U.S. ___, 106 S.Ct. 748 (1986).

from the organizations' religious activities.

A. THE FUNDED ACTIVITIES ARE NOT WHOLLY SECULAR AND CANNOT BE SEGREGATED FROM A RELIGIOUS ORGANIZATION'S SECTARIAN ACTIVITIES.

The above-mentioned standards are flagrantly violated by the Act as it applies to religious organizations. The funded activities are not wholly secular and cannot be segregated from the organizations' religious activities. To the contrary, a religious organization's teachings on sexual morality are so intertwined with its religious tenets that it is impossible for the organization to teach the former without directly promoting the latter.[3]

[3]Amicus Catholic Charities, U.S.A. argues that religion and morality are discrete concepts and that the advancement of the one need not imply the advancement of the other. Brief Amicus Curiae of Catholic Charities, U.S.A. and The Catholic Health Association of the U.S., p. 10. Amicus may be correct with regard to some secular organizations. With regard to religious organizations, however, religion and morality are in-

1. Theology and morality are inseparable for the religious community.

Theology and ethics, or morality, are inseparable for the religious community.[4]

---

separable.

[4]In classical Jewish thought "man as a sexual/social being is the image of God" because "all aspects of human life are ultimately related to God." [D. Novak, "Sex, Society & God in Judaism," p. 153 in F. Greenspahn, (ed.), Contemporary Ethical Issues in the Jewish and Christian Traditions (1986).] The Jerusalem Talmud teaches that "It is impossible for man to live without woman; it is impossible for woman to live without man; and it is impossible for both to live without God's presence [Shekhinah]." [Berachot (J. Talm.) 12d.]

One Baptist ethicist has stated:

> In the Hebrew-Christian tradition, sex is a gift of God, a good which can be abused. Hence, there are numerous passages both in Hebrew and Christian scriptures teaching about the sacredness of sex and its proper role in human life. (See, for example, Proverbs 7; Matthew 5; and 1 Cor. 6).
>
> The Bible admonishes families and religious communities to teach their children and constituents sexual morality (Deuteronomy 5, 6; Proverbs 5; Ephesians 6:1-4). Marriage, celibacy, adultery and fornication are interpreted by religious organizations in terms of their religious presuppositions.
>
> -- Statement of Henlee Hulix Barnette, Ph.D., Emeritus Professor of Christian Ethics, Southern Baptist Theological Seminary, to Oliver Thomas, General Counsel, Baptist Joint Committee on Public Affairs, Dec. 7, 1987.

Because it is grounded in theology, morality is simply the practical expression of sincerely held religious beliefs. Examples are pervasive in the Bible: Because the body is the "temple of God,"[5] Christians are exhorted to abstain from premarital sex.[6] Because humankind is made "in the image of God,"[7] Jews and Christians are taught that human life is sacred.

2. Religious organizations cannot promote sexual morality without consciously or unconsciously promoting religion.

Given that sexual morality is a fundamental religious doctrine, it is inconceivable that religious organizations could counsel or teach sexual morality

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[5]1 Cor. 3:16.

[6]1 Cor. 6:13, 18.

[7]Genesis 1:26-27.

without consciously or unconsciously promoting religion. This is particularly true with regard to discouraging abortion and premarital sex (i.e., fornication), which is the stated purpose of the Act.[8]

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[8]That opposition to abortion and premarital sex are fundamental doctrines of many religious organizations in the United States is borne out by their numerous doctrinal statements and resolutions to that effect. See, e.g., excerpt from "Humanae Vitae", encyclical of Pope Paul VI, July 25, 1968:

> ...we must once again declare that the direct interruption of the generative process already begun, and, above all, directly willed and procured abortion, even if for therapeutic reasons, are to be absolutely excluded as licit means of regulating birth.

and excerpt from "Statement on School-Based Clinics," adopted by the National Conference of Catholic Bishops, Nov. 18, 1987:

> The genital expression of human sexuality is ordered to a total giving of oneself to another person in marriage. Because premarital sexual activity divorces sexual intimacy from the total personal commitment which is its only adequate context, such activity fails to live up to the truth of the human person.* [*In addition to the dignity of the human person as such, for the Christian man and woman this sexual experimentation fails to live up to the fundamental call to holiness as expressed in 1 Thess. 4:2-5 and 1 Cor. 6:13-15, 17-20.] This is why we counsel young people to respect God's law which calls for sexual abstinence before marriage.

and 1984 Southern Baptist Convention Resolution No. 8 — "On Abortion":

> WHEREAS, The Southern Baptist Convention . . . in June 1982, clearly stated its opposition to abortion . . . and
>
> WHEREAS, In addition to legislative remedies for this national sin, it is incumbent that we encourage the woman who is considering abortion to think seriously about the grave significance of such action by presenting information to her about the unborn child in her womb, who is a living individual human being, and encourage her to consider alternatives to abortion; and
>
> WHEREAS, Christlike love requires that such alternatives be made available.
>
> Therefore, be it Resolved, That [we] encourage all of [our] institutions, cooperating churches, and members to work diligently to provide counseling, housing, and adoption placement services for unwed mothers with the specific intent of bringing them into a relationship with Jesus Christ and/or a sense of Christian responsibility; and
>
> Be if further Resolved, That we deplore the practice of performing abortions....

42 U.S.C. §§300z(b) and 300z-10.

The award of AFLA grants to religious organizations constitutes a far more serious threat to religious liberty than did numerous programs aiding religion

that previously have been struck down by this Court. The paying of public monies to religious organizations to promote sexual morality is more constitutionally problematic than supplementing the salaries of parochial school teachers for teaching secular subjects, see Lemon v. Kurtzman, 403 U.S. 602 (1971) and Grand Rapids School District v. Ball, 473 U.S. 373 (1985); providing maps, charts and other instructional materials to parochial schools, see Meek, 421 U.S. 349; furnishing bus transportation to parochial school students for field trips, see Wolman v. Walter, 433 U.S. 229 (1977); or sending public school teachers into parochial schools to teach remedial mathematics, see Grand Rapids School District, 473 U.S. 373, and Aguilar v. Felton, 473 U.S. 402 (1985).

That religious grantees under the Act may not be pervasively sectarian (as were

the grantees in the above-mentioned programs) should not be controlling. These grantees still are religious organizations with "a religious character and purpose." Kendrick v. Bowen, 657 F.Supp. 1547, 1567 (D.D.C. 1987). Their efforts to discourage sexual promiscuity and teen pregnancy, although commendable, must inevitably promote religion.

The first question a pregnant teenager is likely to ask her counselor or instructor is "Should I have an abortion, and if not, why?" Because abortion generally entails less medical risk to the mother than does carrying a fetus to full term,[9] a negative answer would be based on religious rather than medical reasons. The same is true with regard to premarital sex. Why shouldn't teens engage in

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[9]See Christopher Tietze, Induced Abortion, A World Review, 1983 (New York: The Population Council), p. 95; Family Planning Perspectives, January/February 1984, p. 40.

sexual activity if reasonable precautions can prevent disease and pregnancy? Again, for the religious organization, the answer is a fundamentally religious one. As a result, the employees of these religious organizations may "overtly or subtly" indoctrinate their clients or counselees in particular religious tenets at public expense. See Grand Rapids School District, 473 U.S. at 387. Such activity violates the Establishment Clause's strict prohibition against "government-sponsored indoctrination into the beliefs of a particular religious faith." Grand Rapids School District, 473 U.S. at 385. By subsidizing the moral/religious indoctrination of religious organizations, Congress also has violated the Establishment Clause's prohibition against "direct and substantial advancement" of an organization's sectar-

ian enterprise. Grand Rapids School District, 473 U.S. at 394.

B. THE USE OF RELIGIOUS ORGANIZATIONS TO DISCOURAGE PREMARITAL SEX AND ABORTION CREATES A "SYMBOLIC UNION" BETWEEN CHURCH AND STATE AND CONVEYS A MESSAGE OF GOVERNMENT ENDORSEMENT OF RELIGION.

Finally, the Act contravenes the Court's pronouncements against programs that create a substantial "symbolic union" between church and state. Grand Rapids School District, 473 U.S. at 389-92. This symbolic union is especially problematic in a case such as this where the recipients of the government's subsidized services are young, impressionable, and psychologically vulnerable. Indeed, a religious organization may employ the same instructors who teach in a church's religious education program to teach the AFLA curriculum in the same church building.[10] The use of teachers who are

[10]Catholic Charities of the Diocese of Arlington, Virginia, hired facilitators with

clearly identified with an organization's sectarian mission to teach a government-funded program would appear to violate the "Community Education" portion of the Court's decision in Grand Rapids School District, 473 U.S. at 386 (opinion of the Court), and 399 (O'Connor, J., concurring). The overall effect of such a program is to convey an unmistakable message of government endorsement of religion.[11] See Lynch v. Donnelly, 465

A.F.L.A. funds to work on the A.F.L.A. project. All these facilitators were chosen from past or current CCDA staff. All the current case workers at CCDA were hired to be program facilitators in the A.F.L.A. project. One consultant was chosen, in part, because "he was well-known for his work with youth at St. Anthony's parish," and he was teaching religion in a local religious education/CCDA program. R. 155, Statement of Facts, p. 40. Another consultant had taught a sexuality program at St. Luke's parish. R. 155, Statement of Facts, p. 42.

[11] The Act also contains no restrictions against offering these services in a room whose walls are covered with religious symbols or by a teacher who is clothed in clerical garb.

U.S. 668, 690 (1984) (O'Connor, J., concurring).

C. AFLA IS DISTINGUISHABLE FROM GRANT PROGRAMS THAT FUND THE PROVISION OF SECULAR SERVICES BY RELIGIOUS ORGANIZATIONS BECAUSE IT INVOLVES EDUCATION ON A FUNDAMENTAL MORAL ISSUE.

Amici challenge Appellant's assertion that the District Court's holding cannot be logically confined to the Act since every field of social and charitable work may be "religiously motivated."

Religious motivation is not the issue. Most, if not all, of what a religious organization does is religiously motivated, yet some of its activities may be funded by the state and some may not. Again, the question is whether a particular activity is wholly secular and can be segregated from the organization's religious activities. Tilton v. Richardson, 403 U.S. 672 (1971); Hunt, 413 U.S. 734; Roemer, 426 U.S. 736.

Most of the cases cited by Appellant involve the provision of secular services which can be separated from an organization's religious activities and are, therefore, inapposite to the case sub judice.[12] Of the remaining cases, two pre-date Cantwell v. Connecticut, 310 U.S. 296 (1940), and the application of the Establishment Clause to the states via the Fourteenth Amendment,[13] and the remaining one is a U.S. District Court decision involving unique facts and cir-

[12] Bradfield v. Roberts, 175 U.S. 291 (1899); Washington Health Care Facilities Authority v. Spellman, 96 Wash. 2d 68, 633 P.2d 866 (1981); Truitt v. Board of Public Works, 243 Md. 375, 221 A.2d 370 (1966); Craig v. Mercy Hospital - Street Memorial, 209 Miss. 427, 45 So.2d 809 (1950); Kentucky Building Commission v. Effron, 310 Ky. 355, 220 S.W.2d 836 (1949); Community Council v. Jordan, 102 Ariz. 448, 432 P.2d 460 (1967); Richter v. Mayor & Aldermen, 160 Ga. 178, 127 S.E. 739 (1925).

[13] Sargent v. Board of Education, 177 N.Y. 317, 69 N.E. 722 (1904); Dunn v. Chicago Industrial School of Girls, 280 Ill. 613, 117 N.E. 735 (1917).

cumstances (i.e., foster care) that is currently on appeal.[14]

1. Bradfield v. Roberts is not controlling.

Appellant's reliance upon Bradfield v. Roberts, 175 U.S. 291 (1899), in particular is misplaced. First, the Court in Bradfield expressly found that the recipient hospital was not a "religious organization." "The Act of Congress . . . shows there is nothing sectarian in the corporation, and 'the specific and limited object of its creation' is opening and keeping a hospital in the city of Washington for the care of such sick and invalid persons as may place themselves under the treatment and care of the corporation" [emphasis added]. Bradfield, 175 U.S. at 299, 300. Second, even if the hospital were a

[14] Wilder v. Sugarman, 385 F.Supp. 1013 (S.D.N.Y. 1974), modified sub nom. Wilder v. Bernstein, 645 F.Supp. 1292, 329-39 (1986).

religious organization (as are the grantees in this case), the hospital provided a service (i.e., medical care for the city's poor) that could be rendered without invoking or promoting the organization's religious doctrines.

Appellant cites no case upholding a program that pays religious organizations to provide education, counseling and referral services on matters that are fundamental to their religious faith. It is true, as Appellant asserts, that there is nothing "uniquely religious" about sex and pregnancy. "[T]he Bible talks as often about caring for the poor, the widow, the orphan, and the alien as it does about sex."[15] However, there is something "unique" about a program that subsidizes education and counseling by religious organizations on these fundamental religious concerns. While it may be constitutionally permissible for Congress to subsidize the efforts of religious organizations to feed the hungry and shelter the homeless, it would not be permissible to subsidize their efforts to preach to the homeless while feeding and sheltering them.

[15]United Families of America Jurisdictional Statement at 17.

2. Harris v. McRae and McGowan v. Maryland are not controlling.

Amici acknowledge that Congress is not precluded from passing a law solely because its legislative objective coincides with the tenets of some religions. See Harris v. McCrae,[16] 448 U.S. 297 (1980); McGowan v. Maryland, 366 U.S. 420 (1961).

[16]In Harris, the Court stated, "That the Judaeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny." 448 U.S. at 319. The Court in no way indicated, however, that the state could subsidize the efforts of religious organizations to discourage larceny whether by counseling, teaching, or otherwise.

Notwithstanding, Congress is precluded from passing laws that have a primary effect of advancing religion. Lemon, 403 U.S. 602. For example, Sunday closing laws may be constitutional, but Congress could not pay religious organizations to discourage Sunday work. Similarly, there are legitimate secular reasons why the state would wish to promote civil relations between neighbors, but surely Congress could not pay religious organizations to teach the Great Commandment, "Love thy neighbor as thyself."[17]

Harris and McGowan both involved the government passing laws that coincide with widely held religious beliefs. Clearly, this is permissible. The Act, on the other hand, stands this arrangement on its head. Instead of promoting a secular policy that happens to coincide

[17]Lev. 19:18 and Matt. 22:39.

with a religious belief as in Harris and McGowan, Congress is paying religious organizations to promote their religious doctrines because they happen to coincide with government policy. While we commend Congress for combating teen pregnancy, this daring attempt to use religious education to accomplish the secular goals of government must not be allowed.

While the mere possibility that public funds might be used for sectarian purposes is sufficient to invalidate an otherwise lawful grant program, Tilton, 403 U.S. at 682-684, the Court need not speculate in this case. The benefits to religion are "direct and immediate," see Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985), and are well documented. The record contains numerous examples of AFLA funds being used explicitly to advance religion. See Kendrick v. Bowen, 657 F.Supp. at 1564-66. For example, the

grant application for one program which was funded for at least a year states part of its purpose as teaching "the Catholic diocese, Mormon (The Church of Jesus Christ of Latter-day Saints) and Young Buddhist Association's approaches to sex education." R. 155, A. IV, pp. 409-11. Another AFLA program utilized teaching materials that stated in part: "[T]he best sexual relationships are those that come to people who live by standards of sexual behavior consistent with our values as members of The Church of Jesus Christ of Latter-day Saints. . . ." R. 155, A., IV, p. 102. Still another AFLA project promoted "Family Week" which included a proclamation on Christianity and the family by the city of Troy, Alabama, and a resolution by the Alabama House of Representatives which stated in part: "Whereas, the family is the basic unit of western civilization,

And Whereas, Christians cherish the family . . . And Whereas, the Charles Henderson Child Health Center, area ministers and other community organizations in the City of Troy have set aside Sunday, . . . as a day to honor and strengthen the family. . . ." R. 155, A., IV., pp. 406-407.

These and other examples set forth in the record provide ample testimony to the legal absurdity of a program that pays religious organizations to teach sexual morality and at the same time expects them to refrain from promoting religion.

II.

ATTEMPTS TO PREVENT RELIGIOUS ORGANIZATIONS FROM USING AFLA FUNDS TO ADVANCE RELIGION WOULD LEAD TO EXCESSIVE ENTANGLEMENT BETWEEN GOVERNMENT AND RELIGION.

Any effort to salvage AFLA as it applies to religious organizations would run afoul of the third prong of the Lemon

test, which prohibits excessive governmental entanglement with religion. Lemon, 403 U.S. at 613. The Court in Aguilar, 473 U.S. 402, recently struck down a program similar to AFLA. In fact, Aguilar presented a lesser potential for excessive entanglement than does the Act.

Aguilar involved a challenge to federal financial assistance for local educational institutions to provide remedial programs for educationally deprived children from low-income families. Private parochial schools were among the schools into which public schoolteachers were sent to provide these programs. However, in all cases it was the city which made teacher assignments. The teachers were supervised by state field personnel and, often, the teachers were not of the same faith as the schools they served. Professionals involved in the program were directed to avoid involvement with reli-

gious activities conducted within the private schools and to bar religious materials and religious symbols from the classroom. 473 U.S. at 406-07 (opinion of the Court), and 425 (O'Connor, J., dissenting).

It is noteworthy that the Aguilar program, after nineteen years, had an "unblemished record" of not one single instance of attempted "indoctrination" in "particular religious tenets at public expense." 473 U.S. at 424-25 (O'Connor, J., dissenting). Yet, despite the reliance on public school instructors, and the absence of a single instance in which a teacher was alleged to have promoted religion while providing remedial services, the Supreme Court found the Aguilar program unconstitutional. The institution of a monitoring system, the Court held, inevitably results "in the excessive entanglement of church and

state . . ." because continually overseeing a teacher to ensure that he or she would not convey a religious message constituted "governmental intrusion into sacred matters." 473 U.S. at 409-10. The Court cited, with favor, language from Lemon:

> A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that . . . restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church.

Aguilar, 473 U.S. at 410 (citing Lemon, 403 U.S. at 619).

The Court in Aguilar distinguished Chapter I from those programs aiding religiously affiliated colleges and universities such as that sustained in Roemer, 426 U.S. 736. In providing the latter type of aid, the state would be

able "to identify and subsidize separate secular functions carried out at the school, without on-the-site inspections being necessary to prevent diversion of the funds to sectarian purposes." Aguilar, 473 U.S. at 411 (citing Roemer, 426 U.S. at 765) (emphasis supplied). Unlike Roemer, any meaningful attempt to prevent the use of AFLA funds to support religion would require substantial monitoring through on-site inspections.

The "unblemished" program struck down in Aguilar stands in vivid contrast to the programs created by and funded under the Act. The record is replete with instances in which the AFLA grantees have attempted "indoctrination" in their beliefs at "public expense." Aguilar, 473 U.S. at 424-25. The teaching that has taken place at government expense is not of secular beliefs that "merely happen to coincide" with a religious point of view,

McGowan, 366 U.S. 420, but rather constitutes the teaching of explicitly religious doctrine.[18] Among the many such cases:

--- A curriculum outline for the family life education component of the AFLA program at St. Ann's Infant and Maternity Home states, in its "intimacy section," that the "spiritual" facets of intimacy include: "Meaning of life for both partners, relationship to the universe and God. Meaning of my (and his) existence. Grows over the years, more important with aging." Girls are instructed on the "Christian tradition" of marriage and are referred to four places in the Bible where annotations on marriage can be found. R. 155, A., III-A, pp. 567, 569 (O'Keefe Dep. Exh. 4, pp. 4, 7).

[18] In fact, much of the instruction funded by AFLA has been performed by clergymen.

--- Grantee Catholic Charities of Diocese of Arlington ("CCDA") provides programming in which suggested discussion questions for parents focus on the theme "parents discuss how Catholic values fit into their lives," and suggested discussion questions for teenagers focus on the theme "how Catholic values influence their [teens'] final decision RE: Sex." J.A. 253. Particular discussion questions for teenagers focus on the Church's teachings in such areas as abortion, premarital sex and homosexuality (e.g., "Is homosexuality a sin?"). J.A. 254.

--- Father Hortum of Grantee St. Mark's Church integrated religious beliefs and teachings into his presentation. He

"based it all on Jesus Christ." He referred to Jesus throughout his presentation. J.A. 284. (Hortum Dep. 37).

--- Grantee Charles Henderson Child Health Center provides in its curriculum that "the Family Life curriculum was designed so that it would . . . never contradict [that] which is taught at home or in church, but it should act as a support for these institutions." R. 155, A., IV, p. 404 (Doc. 7674).

While acknowledging that constitutional violations have occurred, Appellant Bowen insists that safeguarding against future violations need require no excessive entanglement between government and religion as long as the religious grantees are not pervasively sectarian. Appellant bases his argument on the fact that every case in which the Court has struck down a

program for potential excessive entanglement involved a church or parochial school. The monitoring of a grantee which is not pervasively sectarian, he argues, is "just that -- monitoring -- precisely the sort of supervision that the government exercises in its many other grant programs." Brief of Appellant Bowen at 42-45. The fact that the institution is not pervasively sectarian is said to alleviate the need for close surveillance because the danger of infusing "ostensible secular activity" with "religious content or significance" is so greatly reduced. Id. at 45.

To be sure, Aguilar involved pervasively sectarian institutions and the Court properly noted this as a factor in its decision. The Court has found that day-to-day monitoring of pervasively sectarian organizations presumptively leads to excessive entanglement because of their

mission of promoting a clear and undiluted religious perspective. Aguilar, 473 U.S. at 413. No such general presumption exists with regard to other religious organizations when, as in Roemer, "the secular and sectarian activities of the [organization] are easily separated." Roemer, 426 U.S. at 764. But when, as here, the aid provided calls upon religious organizations to teach a fundamental moral/religious doctrine, such a separation cannot be made. The record unequivocally confirms this. It reflects not one -- but repeated -- instances of teaching from a religious perspective. Religious grantees simply are not capable of ensuring the avoidance of religious indoctrination when "moral education" is involved. The teaching of such ideological material is not entitled to the presumption of non-endorsement which otherwise might be afforded to

religious institutions which are not pervasively sectarian.

It should be noted that consideration of the character and purposes of a grantee, i.e., whether it is a pervasively sectarian organization, is but one factor the Court has reviewed in determining whether a program runs afoul of the third prong of the Lemon test. Specifically, the Court has considered the nature of the aid and the resulting relationship between government and religion. Lemon, 403 U.S. at 615.

Here, the nature of the aid is intended to promote instruction and counseling from a designated ideological perspective in sensitive areas of family life, marriage, sexuality and abortion. These topics are a major focus of current religious education and are the center of ongoing dissension and debate. They cannot be taught by religious organiza-

tions without the type of monitoring that would lead to impermissible levels of entanglement between government and religion.

III.

DISQUALIFICATION OF RELIGIOUS ORGANIZATIONS FROM PARTICIPATION IN AFLA WOULD NOT VIOLATE THE CONSTITUTIONAL GUARANTEES OF FREE EXERCISE OF RELIGION OR EQUAL PROTECTION OF THE LAWS.

Appellant and his amici have suggested that for religious organizations not to be eligibl for aid of the type provided by AFLA might be violative of their free exercise rights or might deny those institutions equal protection of the laws as guaranteed by the Fifth Amendment. See, e.g., Brief for Appellant United Families of America at 9-11; Brief for Appellant Bowen at 37-38. These oblique contentions are without merit.

Certainly, treating religious persons and organizations differently from their

non-religious counterparts may have Free Exercise and Equal Protection ramifications. For example, the Court has struck down a state statute which barred clergymen from serving in particular public offices.[19] McDaniel v. Paty, 435 U.S. 618 (1978). Notwithstanding, the Court has never indicated that religious and non-religious organizations always must be treated alike. To the contrary, distinctions may be required in order to avoid Establishment Clause violations as in the case of aid to primary and secondary schools. In Aguilar, 473 U.S. 402, for example, the Court recognized that certain types of aid, which may be permissible for non-sectarian private

[19]Seven of the eight Justices voting so held based primarily on Free Exercise Clause analysis. Justice White found no violation of that provision but found that the statute constituted a violation of the right to equal protection.

schools, are not permissible for their sectarian counterparts.

While the Free Exercise Clause provides a broad range of protections to persons and organizations in the exercise of their religious beliefs and allows some "play in the joints" for government accommodation of religion, this case presents no threat to Free Exercise concerns. Disqualified organizations will not be denied "important benefits" to which they would otherwise be entitled because they are unwilling to commit an act prohibited by religious faith, compare Sherbert v. Verner, 374 U.S. 398 (1963) and Hobbie v. Unemployment Appeals Commission, _____ U.S. _____, 107 S.Ct. 1046 (1987); penalties will not be imposed on any person because she acts in a fashion demanded by her beliefs, compare Wisconsin v. Yoder, 406 U.S 205 (1972); and no government action will have been

taken which makes it impossible for religious practices to be carried out, Cf. Lyng v. Northwest Indian Cemetery Protective Association, 795 F.2d 688 (9th Cir. 1986), cert. granted, 55 U.S.L.W. 3746 (May 4, 1987) (No. 86-1013).

CONCLUSION

For the above-stated reasons, amici urge that the decision of the United States District Court for the District of Columbia be affirmed.

Respectfully submitted,

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